STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
On Its Own Motion	)	Docket No. 11-0711
	)	
Development and adoption of rules	)	
concerning rate case expense.	)	

REPLY BRIEF ON EXCEPTIONS OF NICOR GAS COMPANY

June 13, 2013

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In accordance with Section 200.830 of the Rules of Practice of the Illinois Commerce Commission ("Commission"), 83 Ill. Admin. Code § 200.830, and the schedule established by the Administrative Law Judge ("ALJ"), Northern Illinois Gas Company d/b/a Nicor Gas Company ("Nicor Gas") respectfully submits its Reply Brief on Exceptions to the ALJ's Proposed Order dated April 30, 2013 ("Proposed Order" or "PO") and Appendix thereto, which is the Draft Rule on Rate Case Expenses ("Draft Rule").

I. Executive Summary

Although contested issues remain, there are several consistent themes in the Briefs on Exceptions ("BOE") filed by Commission Staff ("Staff") and the following parties to this proceeding: Nicor Gas, Commonwealth Edison Company ("ComEd"), North Shore Gas Company and The Peoples Gas Light and Coke Company (collectively, "Peoples Gas"), MidAmerican Energy Company ("MidAmerican"), Ameren Illinois Company d/b/a Ameren Illinois ("AIC") (collectively, the "Utility Stakeholders"), as well as the Illinois Attorney General ("AG") and the Citizens Utility Board ("CUB").

First, it is undisputed that the Draft Rule in this proceeding was developed through a cooperative and time-intensive effort on the part of Staff, the parties, and the ALJ, and that these

efforts are to be commended. *See*, *e.g.*, Staff BOE at 1; ComEd BOE at 1; Peoples Gas BOE at 2; *see also* Utility Stakeholders Init. Br. at 2.

Second, the parties unanimously agree that the Proposed Order misstates the Illinois Appellate Court's holding in *People ex rel. Lisa Madigan v. Illinois Commerce Comm'n*, 2011 IL App (1st) 101776 (1st Dist. Dec. 9, 2011, *reh'g denied*, April 11, 2012) ("*Madigan*"), *appeal denied* (Ill. S. Ct. Sept. 26, 2012). In particular, the parties agree that the Proposed Order errs in concluding that *Madigan* "required" the Commission to undertake a particular analysis because, in fact, *Madigan* simply offered "guidance" to the Commission in its assessment of rate case expense. *See* Nicor Gas BOE at 6; Staff BOE at 4; ComEd BOE at 9; Peoples Gas BOE at 5-6; MidAmerican BOE at 5-6; AIC BOE at 6; AG-CUB BOE at 6. In light of this agreement, there can be no doubt that the Commission should amend the Proposed Order consistent with the revised language offered in Nicor Gas' Exceptions where the Proposed Order concludes that *Madigan* requires the Commission to follow *Kaiser v. MEPC American Props., Inc.*, 164 Ill. App. 3d 978 (1st Dist. 1987) and other fee-shifting cases in the rate case context.

Nicor Gas has only one objection to an exception made by another party[1] – the AG's exception to the Proposed Order's determination to exclude "consideration of salaries of Staff counsel and the AG when determining what constitutes a just and reasonable level of compensation … charged as rate case expense." AG-CUB BOE at 3. Notably, CUB now takes no position on this issue (*see id*.) even though CUB previously advocated for the same position now advanced by the AG alone. AG-CUB Corr. Init. Br. at 10. As will be demonstrated below, the Proposed Order correctly concludes that the Draft Rule should not include consideration of

[1] Nicor Gas also notes that AG-CUB mischaracterize the Utility Stakeholders as arguing that "Section 9-229 does not require any heightened level of scrutiny on the Commission's part." AG-CUB BOE at 2. On the contrary, the utilities' argument was that "Section 9-229 does not impose a substantive standard different from that which the Commission has employed for decades to assess whether rate case expenses should be allowed as an operating expense." *See* Utility Stakeholders Init. Br. at 3-4.

non-profit and government attorney compensation as a factor in the determination of the reasonableness of fees. PO at 24. Therefore, the Commission should adopt the Proposed Order's conclusion in this regard and reject the AG's Exception No. 6.

II. The AG's Exception No. 6 Should Be Rejected

The AG's Exception No. 6 asks the Commission to revise the Proposed Order and Draft Rule to provide for "an examination of Staff and governmental hourly rates when assessing the reasonableness of … rate case expense." AG-CUB BOE at 18. The Proposed Order correctly rejects the AG's argument based upon several grounds:

- "[T]he terms of employment between government/not-for-profit attorneys and those in private practice are not the same. (*e.g.*, employment benefits, pension vs. other retirement plan, the level of support staff, hours expected to be worked, level of responsibility, etc.)."
- "[T]he AG … has given this Commission no methodology, through which, this Commission could compare the two (government/not-for-profit vs. private attorneys) in a meaningful way."
- Case law holds that "the government is entitled to the market rates for its attorney's fees, irrespective of the fact that generally, the actual salary of a government attorney is less than that for an attorney in private practice."

PO at 24. The AG offers nothing in its brief on exceptions to counter each of these well-supported conclusions in the Proposed Order.

As to the first conclusion, the AG concedes, as it must, that the terms of compensation vary among attorneys in private practice and those in government/not-for profit settings. AG-CUB BOE at 18. However, the AG argues that compensation for government attorneys is appropriately included "within the 'market' of compensation" because "the 'responsibility' and workload when it comes to Commission cases are comparable." *Id*. (citing *Kaiser*, 164 Ill. App. 3d at 984). The AG's theory is not supported by *Kaiser* and, in fact, the AG's argument is contrary to law.

Illinois courts determining whether attorneys' fees are appropriately awarded have held that the reasonableness of such fees should be determined by reference to the market rate for such services, among other things. *See, e.g.*, *Rackow v. Illinois Human Rights Comm'n*, 152 Ill. App. 3d 1046, 1062-63 (2d Dist. 1987) (naming "customary charge in the community" among factors to be considered in determining the reasonableness of fees); *Demitro v. Gen. Motors Acceptance Corp.*, 388 Ill. App. 3d 15, 23 (1st Dist. 2009) (explaining that "a reasonable hourly rate is 'the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation.'") (citations omitted).

The same holds true for fees awarded to in-house counsel. *See, e.g.*, *Cent. States, Southeast and Southwest Areas Pension Fund v. Cent. Cartage Co.*, 76 F.3d 114, 115-116 (7th Cir. 1996) (prevailing plaintiff in an ERISA action was entitled to an award of attorneys' fees under that statute, and thus could receive "market value" for the time its in-house counsel spent prosecuting the claim); *AMX Enter., L.L.P. v. Master Realty Corp.*, 283 S.W. 3d 506, 516-20 (Ct. App. Tx. 2009) (plaintiff corporation could recover its in-house counsel's fees under a state statute allowing for such recovery "at the market rate for outside counsel" where in-house counsel actively worked on the litigation).

Further, the Proposed Order correctly recognizes that courts have held that the government is entitled to market rates for its attorney's fees, "irrespective of the fact that generally, the actual salary of a government attorney is less than that for an attorney in private practice." PO at 24 (citing *City of Chicago v. Ill. Commerce Comm'n*, 187 Ill. App. 3d 468, 470-72 (1st Dist. 1989)). *See also Blum v. Stenson*, 465 U.S. 886, 895 (1984) (holding that attorneys' fees awarded to nonprofit attorneys in civil rights cases "are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented

by private or nonprofit counsel"); *NLRB v. Local 3, Int'l Bhd. of Elec. Workers*, 471 F.3d 399, 406-07 (2d Cir. 2006) (noting that "[c]onsistent with this precedent district courts in this Circuit generally employ market rates to calculate awards of government attorneys' fees."); *United States v. City of Jackson*, 359 F.3d 727, 732-34 (5th Cir. 2004) (same); *United States v. Big D. Enter., Inc.*, 184 F.3d 924, 936 (8th Cir. 1999) (same); *Napier v. Thirty or More Unidentified Federal Agents, Employees, or Officers*, 855 F.2d 1080, 1092-93 (3d Cir. 1988) (same); *Pakter v. New York City Dept. of Educ.*, No. 08-CW-7673, 2011 U.S. Dist. LEXIS 8813, *4 (S.D.N.Y. Jan. 31, 2011) ("Market rate is appropriate regardless of whether Defendants' attorneys are private attorneys, non-profit attorneys, or government employees."). The AG fails to address any of these cases.

The AG asserts that the hourly rates of Staff counsel and AG counsel can be determined by taking their salaries published online and running a "simple mathematical computation … assuming a 40-hour work week." AG-CUB BOE at 18. This methodology was not previously explained by the AG; instead, the AG argued that "hourly compensation can be easily computed through public records." AG-CUB Corr. Init. Br. at 9. More importantly, the AG's argument does not respond to the Proposed Order's justified criticism that its vague suggestion did not provide a methodology through which the Commission could compare private attorneys with government/not-for-profit attorneys "in a meaningful way." PO at 24. Furthermore, "because government attorneys receive a fixed salary and do not bill a client for their services, a proportionate share of attorneys' salaries does not necessarily correlate to expenses actually incurred in pursuing a given case." *Local 3*, 471 F.3d at 407. "It is axiomatic that attorney billing rates do not correlate with annual salary because an attorney's billing rate is designed to cover more than the attorney's net income expectations. Moreover, we have long recognized

that the hourly rate of the local legal community may serve as a benchmark for determining the amount of attorney's fees to be imposed upon a party." *Big D Enters.*, 184 F.3d at 936.

The AG also fails to account for the fact that whatever the hourly rates of the in-house counsel at Staff and the AG may be calculated to be, that figure would likely need to be adjusted to include items that private sector attorneys cannot attribute to a particular client or matter and therefore do not separately charge for, including, among other things, rent, utility bills, phone charges, secretarial support, and other expenses ordinarily included in office overhead, as well as a net income component. *See* Utility Stakeholders Reply Br. at 9-10. Without addressing any of these flaws in its theory, the AG asserts that its point in requesting consideration of government salaries is to recognize that ratepayers have no say in the fees paid to utility attorneys but are required to pay those fees. AG-CUB BOE at 18-19. The AG's argument is inapposite because, as the Proposed Order correctly recognizes, "rate case expense involves standard operating expenses that are recoverable as of right by the utility." PO at 3.

Finally, the AG erroneously asserts that Section 8-401 of the Public Utilities Act somehow bears on the Commission's assessment of rate case expense. AG-CUB BOE at 19 (citing 220 ILCS 5/8-401). The AG previously argued that the "mandate" of Section 8-401 should be taken into consideration in this proceeding (*see* AG-CUB Corr. Init. Br. at 4-5) and the Proposed Order entirely – and correctly – disregarded that argument as misplaced. Section 8-401 relates to utility service obligations and conditions and was not intended to be applied to rate case expense. Section 8-401 is implemented through 83 Ill. Admin. Code 411, Electric Reliability, which relates to the Commission's policies regarding reliability of facilities and services and does not concern rates. *See* 83 Ill. Admin. Code 411, *et seq*.

Moreover, the Commission has made it clear that "least-cost" service does not mean "the most simple, basic and cheapest" service. *See In re Commonwealth Edison Co.*, ICC Docket No. 07-0566 (Order Sept. 10, 2008) ("Our least cost requirements, however, do not require that electric service be the most simple, basic, and the cheapest form of electric service available."). Put simply, the Commission should adopt the Proposed Order's refusal to rely upon Section 8-401 in any respect in considering the Draft Rule.

In short, the Commission should reject the AG's Exception No. 6 and the associated replacement language relating to the consideration of hourly rates for government attorneys as wholly irrelevant to the determination of the justness and reasonableness of rate case expense.

III. Conclusion

WHEREFORE, for the reasons set forth herein, in its Brief on Exceptions and in the joint submissions made by the Utility Stakeholders in this proceeding, Northern Illinois Gas Company d/b/a Nicor Gas Company respectfully requests that the Proposed Order and Draft Rule be modified consistent with the replacement language in Nicor Gas Company's Exceptions and, as modified, be adopted by the Commission.

Dated: June 13, 2013

Respectfully submitted,

NORTHERN ILLINOIS GAS COMPANY
D/B/A NICOR GAS COMPANY

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